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Case Number _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1994

BMMG, INC., ROBERT S. MANN, AND BOB MANN'S MALIBU GYM, INC.,

Petitioners,

v.

AMERICAN TELECAST CORPORATION, WALLY ARMSTRONG GOLF, INC., WALLY ARMSTRONG, KENNETH ROGERS AND GEORGE SUMMERALL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether under the Lanham Act, nonmovant plaintiff upon a motion for summary judgment must show that any one particular false statement in a wholly false advertisement, e.g. an advertisement which promotes that which does not exist, caused it a particular lost sale before it is entitled to an inference of a genuine issue of material fact in connection with its burden to show the fact of damage.

2. Whether relevant market in an action for damages under the Lanham Act may be determined as a matter of law.

LIST OF PARTIES

Petitioners BMMG, Inc., Robert S. Mann, and Bob Mann's Malibu Gym, Inc. were the plaintiffs and appellants below.

Respondents American Telecast Corporation, Wally Armstrong Golf, Inc., Wally Armstrong, Kenneth Rogers, and George Summerall were defendants and appellees below.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CITED AUTHORITIES vi

I. OPINIONS BELOW 2

II. JURISDICTION 3

III. STATUTES INVOLVED 4

IV. STATEMENT OF THE CASE 4
- A. Overview 4
- B. Statement of Facts 5
- C. Proceedings Below. 11

V. REASONS FOR GRANTING THE WRIT . . 13
- A. The trial court departed from the accepted and usual course of judicial proceedings on summary judgment by raising plaintiff's burden upon summary judgment to such an extent as to violate plaintiff's guarantee of due process and equal protection of the laws. The Ninth Circuit failed to correct this error 14

TABLE OF CONTENTS (cont.)

1. As it is a two firm market, material misrepresentations in respondents' advertising will damage petitioners . . 15

2. Petitioners offered evidence that respondents' deception caused their harm. 16

3. The Ninth Circuit created a conflict among the Circuits when it affirmed the trial court's determination of relevant market as a matter of law 17

B. In an unpublished opinion, the Ninth Circuit departed from the accepted and usual course of judicial proceedings by failing to demonstrate it applied the appropriate de novo standard of review and by adopting a standard of causation in conflict with the purposes of the Lanham Act. 20

TABLE OF CONTENTS (cont.)

C. These proceedings involve a question of exceptional importance as the Ninth Circuit's decision frustrates the purposes of the Lanham Act, to protect the public from false and misleading advertising. In practical application, it denied petitioner equal protection under the Lanham Act and Federal Rules . . . 25

VI. CONCLUSION 27

TABLE OF CITED AUTHORITIES

CASES

Supreme Court Decisions

Anderson v. Liberty Lobby, Inc.,
(1986) 477 U.S. 242 23-24

Celotex Corp. v. Catrett,
(1986) 477 U.S. 317 14

Circuit Court Decisions

Country Floors, Inc.
v. Gepner, (7th Cir. 1991)
930 F.2d 1056 . . . . . 19, 23

Electronics Corp. of Am.
v. Honeywell, Inc., (1st Cir. 1970)
428 F.2d 191 15

Harper House, Inc.
v. Thomas Nelson, Inc.,
(9th Cir. 1989) 889 F.2d 197 . . 19

Kruso v. International Tel.
& Tel. Corp., (9th Cir. 1989)
872 F.2d 1416 23

Tzung v. State Farm Fire & Cas. Co.,
(9th Cir. 1989) 873 F.2d 1338 . 23

TABLE OF CITED AUTHORITIES (cont.)

Circuit Court Decisions (cont.)

U-Haul Intern., Inc. v. Jartran, Inc., (9th Cir. 1986) 793 F.2d 1034 . 21

District Court Decisions

Grant Airmass Corp. v. Gaymar Industries, Inc., (S.D.N.Y. 1986) 645 F.Supp. 1507 14

U-Haul Intern., Inc. v. Jartran, Inc., (D. Arizona 1986) 601 F.Supp. 1140 27

State Court Decisions

Summers v. Tice, (1948) 33 Cal.2d 80 22

TABLE OF CITED AUTHORITIES (cont.)

STATUTES

California Business & Professions Code,
§ 17200 11
§ 17500 11

Federal Rules of Civil Procedure,
Rule 56 . . . . . passim

15 U.S.C. § 1125 . . . . . passim

15 U.S.C. § 1254 3

28 U.S.C. § 1291 3

OTHER AUTHORITIES

6 Moore's Federal Practice
¶ 56.15[3] 24
¶ 56.27[1] 24

McCarthy, Trademarks and Unfair Competition (3d ed. 1995)
§ 27 et seq. 15

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

Petitioners BMMG, Inc., Robert S. Mann, and Bob Mann's Malibu Gym, Inc. respectfully pray that a writ of

certiorari issue to review the judgment of the Ninth Circuit Court of Appeal, filed December 1, 1994, of which rehearing and/or rehearing en banc was denied on February 7, 1995.

I. OPINIONS BELOW

The order denying rehearing and/or rehearing en banc is reprinted in the Appendix hereto as Exhibit A, at page 1.

The unreported memorandum opinion of the Ninth Court of Appeal is reprinted in the Appendix hereto as Exhibit B, beginning at page 2.

The unreported memorandum decision of the trial court (Hupp, J.) is reprinted as Exhibit C in the Appendix hereto, beginning at page 6.

II. JURISDICTION

The relevant claims by petitioners were predicated on the Lanham Act. 15 U.S.C. § 1125(a) and (a)(2). The trial court had jurisdiction pursuant to 15 U.S.C. § 1291.

On December 1, 1994, the trial court, The Honorable Harry L. Hupp presiding, entered judgment in favor of the Respondents. On June 9, 1993, petitioners filed a timely notice of appeal. On December 1, 1994, the Ninth Circuit Court of Appeal filed its memorandum opinion affirming the judgment of the trial court. Petitioners timely filed a petition for rehearing, which was denied by order dated February 7, 1995.

The jurisdiction of this Court to review the judgment of the Court of Appeal is invoked under 28 U.S.C. § 1254.

III. STATUTES INVOLVED

The statutes and regulations involved, Federal Rules of Civil Procedure, Rule 56 and the relevant section of Section 43(a) of the Lanham Act, 15 U.S.C. section 1125, are reprinted in the appendix beginning at page 27.

IV. STATEMENT OF THE CASE

A. Overview

As stated previously, the issue presented is whether under the Lanham Act, a plaintiff must show that at least one particular false statement in a completely false advertisement, e.g. an advertisement which promotes that which does not exist, caused a particular lost sale before it is entitled to an inference of a genuine issue of material fact in connection with its burden to show the fact of damage. In

addition, this writ presents the issue whether relevant market in an action for damages under the Lanham Act may be determined as a matter of law.

B. Statement of Facts

Petitioners were the first, and until 1991, the only producer and seller of golf instructional videotapes via television "infomercial."[1] In late 1990, petitioners began to use sports' celebrity endorsements in their infomercials. As a result they experienced increasing sales

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1. An "infomercial" is a commercial, television advertisement which contains a show portion, designed to be of special interest to a limited audience, e.g. golfers who wish to learn or improve their game, together with a commercial portion designed to sell the product, e.g. golf instructional videotapes. Infomercials are a relatively new, but extremely significant and growing, segment of the advertising industry. Their power is precisely from their "educational" format.

and profits. Petitioners' three instructional tapes run approximately two hours and could be purchased by infomercial viewers for approximately $45.00, including shipping and handling. Their tapes feature golf techniques which emphasize that a power swing's source is the golfer's legs.

The infomercial business is unlike traditional advertising in that each show is a separate profit and loss center. Each show is tracked to determine its rate of return. When the media cost of the infomercial exceeds the income derived from the sales of the product, it is no longer broadcast. For example, by December 1991, petitioners' were experiencing a ratio of revenue to media expenditures of approximately 2.9 (revenue) to 1 (media expenditure) in the

local broadcast market, 2.3 to 1 in the national cable market and 3.9 to 1 in the regional sports market.

In December 1991, respondents began to broadcast the infomercial entitled "Golfing Breakthroughs of the '90's" (the "Breakthrough Infomercial"). The Breakthrough Infomercial falsely advertised a set of instructional golf videotapes which were represented to be titled "Maximizing Your Game and Everything About It" (the "Maximizing Tapes"). The Maximizing Tapes could be ordered during the Breakthrough Infomercial for three payments of approximately $50. The Breakthrough Infomercial made the most fundamental false claim--<u>that the Maximizing Tapes existed</u>. Respondents did not tell Breakthrough Infomercial viewers that the

Maximizing Tapes had not yet been produced or that respondents had not yet commited to producing them.

In the Breakthrough Infomercial, Respondents made numerous additional, intentionally false and misleading representations. For example, the Breakthrough Infomercial claimed that the celebrity endorsers had seen and used the nonexistent tapes, that the nonexistent tapes taught a "revolutionary," "breakthrough" technique whereby the power swing's source is in the golfer's wrists and not the golfer's legs, and failed to disclose that noncelebrity endorsements were made by individuals with close personal and financial ties to respondent Wally Armstrong ("Armstrong").

From December 6, 1991 through February 8, 1992, respondent American

Telecast Corporation ("ATC") was using the Breakthrough Infomercial to "test market" the nonexistent Maximizing Tapes. As respondents' false advertisement was broadcast, petitioners' sales took a dramatic plunge. As a result of this precipitous drop, petitioners were financially unable to purchase television air time. Petitioners were literally "knocked off the air" by respondents' false advertising campaign.

For the three month period ended March 31, 1992, during "test marketing" and "roll out" or general broadcast, the respondents spent $1,888,000 to telecast the Breakthrough Infomercial. During that same period, respondents earned $4,546,000 in net revenues from the tape sales. For the three months ended June 30, 1992, the respondents spent $3,642,000 to broadcast

the Breakthrough Infomercial and earned in excess of $7,887,000 in net revenue from tape sales.[2] Respondents' $12,433,000 in sales for the period ended June 30, 1992 represented 77% of their revenue for that year.

Petitioners filed their Complaint on June 2, 1992. In late July 1992, respondent ATC edited the Breakthrough Infomercial. Among other things, respondent George (Pat) Summerall's ("Summerall") endorsement that the Maximizing Tapes "are more comprehensive, easier to apply than any golf video I've ever seen. . ." was deleted. Respondents

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2. The Maximizing Tapes were not filmed until two or three months after the Breakthrough Infomercial was first telecast. When subsequently produced, the Maximizing Tapes did not contain the "breakthrough" techniques that the Breakthrough Infomercial advertised.

also identified at least one noncelebrity endorser's relationship to Armstrong. As a consequence, petitioners were able to reenter the infomercial market in September 1992 and their revenues, media expenditures and profitability immediately returned to its prior, successful levels.

C. Proceedings Below.

Petitioner's complaint in the District Court asserted violations of the Lanham Act, Section 43(a), 15 U.S.C. 1125(a), pendent state law claims for violations of California's unfair competition and false advertising statutes (California Business & Professions Code §§ 17200 and 17500) and for common law business torts.

The respondents moved for summary judgment on all counts.

In opposition to the motions, petitioners presented evidence controverting nearly a dozen of respondents' allegedly undisputed facts, thus precluding summary judgment.

The trial court, however, granted respondents' motion finding, "[t]he question is to what extent did the false statements in the endorsements hurt sales of plaintiffs' product." In order to reach this conclusion the trial court ignored evidence in the record regarding relevant market, and determined petitioners' assertion defied common sense. The district court also ignored its own finding that respondents' advertisement was wholly false during the roll-out period. The state law claims essentially followed the reasoning and the fate of the Lanham Act claim.

On appeal, the Ninth Circuit found evidence that ATC's sales caused petitioner to lose sales. Nonetheless, the Ninth Circuit affirmed the district court in an unpublished opinion, and rehearing was denied.

Petitioners now seek certiorari.

V. REASONS FOR GRANTING THE WRIT

Petitioners' claims were substantively meritorious. The Central District and Ninth Circuit denied petitioners a fair hearing. The Ninth Circuit denied petitioners due process and equal protection in the following respects:

A. The trial court departed from the accepted and usual course of judicial proceedings on summary judgment by raising plaintiff's burden upon summary judgment to such an extent as to violate plaintiff's guarantee of due process and equal protection of the laws. The Ninth Circuit failed to correct this error.

Petitioners' burden upon summary judgment is to show merely that there is a genuine issue as to any material fact. Celotex Corp. v. Catrett, (1986) 477 U.S. 317, 324. Petitioners were not obligated to put forward all their evidence, as at trial, to create such a genuine issue. That lost customers were mislead by respondents' false advertisment "is not the sine qua non of a Lanham Act claim, but rather goes to the *quantum* of proof." Grant Airmass Corp. v. Gaymar, (S.D.N.Y. 1986) 645 F.Supp. 1507.

The presumption that consumers are in fact deceived under a "single source exception" justifies the presumption that a competitor was injured.

1. As it is a two firm market, material misrepresentations in respondents' advertising will damage petitioners.

Petitioners and respondents were the only two suppliers in the market for infomercial golf instructional videotapes. The First Circuit has found a presumption regarding damage will apply in a two source market. McCarthy, Trademarks and Unfair Competition (3d ed. 1995) at § 27.01[4] citing Electronics Corp. of America v. Honeywell, Inc., 428 F.2d 191.

The Ninth Circuit's December 10, 1994 memorandum opinion also misstated the record to say that appellants relied on a

legal presumption to prove the injury element of their case. That was not so.

2. Petitioners offered evidence that respondents' deception caused their harm.

Petitioners, however, did not rely solely on a presumption. Petitioners put forward evidence of the causal link between the Breakthrough Infomercial and their lost sales in both the testimony of petitioner Bob Mann and through petitioners' expert, Dr. Thomas Scott.[3]

Petitioner Mann declared, "Defendants' false and misleading Breakthrough Infomercial directly caused a substantial decrease in sales of my video

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3. There was additional supporting testimony and foundational data of petitioners' business entities' financial officer and the testimony of a certified public accountant.

tapes and related products." Dr. Scott testified, "I have examined the information in this case and based on my findings I feel that it is reasonable to conclude that American Telecast Corporation's false advertisements caused Bob Mann Sports to lose sales." The Ninth Circuit misstates the record when it concluded that petitioners solely relied on comparative sales data.

3. The Ninth Circuit created a conflict among the Circuits when it affirmed the trial court's determination of relevant market as a matter of law.

Petitioner Mann declared

> In 1992, the only two participants in the national market for the sale of golf instructional videotapes by television infomercial were myself and defendants. My infomercials and ATC's infomercials are in direct competitionwith each other. My business and my reputation were damaged by the false representations made in the Breakthrough infomercial.

It was not disputed that all of respondents' sales during the rollout period relied on the completely false Breakthrough Infomercial. There was evidence that at least some of those sales were at the expense of petitioners' sales. Were petitioners permitted to present all of their evidence, a reasonable jury may have inferred that the Breakthrough Infomercial in fact injured petitioners.

In order to avoid the conclusion that petitioners produced actual evidence of injury resulting from respondents' false and misleading advertisement, the Ninth Circuit accepted without comment the trial court's determination of relevant market.[4]

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4. The Central District opined that, "[p]laintiffs say that only plaintiffs and defendants use the infomercial method of advertising; this may be so, but that does not create a specialized sub-market. (continued...)

The Ninth Circuit thus affirmed the Central District's finding that petitioners were required to prove that specific false statements of the celebrity endorsers caused a loss of their sales. See, Harper House, Inc. v. Thomas Nelson, Inc., 889 F.2d 197, 210 (9th Cir. 1989).

Petitioners contend that the trial court incorrectly determined the relevant market. Determination of the relevant market is a factual determination properly left for the jury. When the Ninth Circuit affirmed the trial court on this point, it created a conflict among the Circuits. In Country Floors, Inc. v. Gepner, 930 F.2d

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4.(...continued)
advertising; this may be so, but that does not create a specialized sub-market. Obviously, plaintiffs and defendants must compete with all golf instructional products using differing media of advertising."

1056 (7th Cir. 1991), the Seventh Circuit found in a Lanham Act action that what is the relevant market should not be determined by the trial court on summary judgment "because it presents a genuine issue of material fact." As such, determination of relevant market should be left to the jury. Id. at 1066.

B. In an unpublished opinion, the Ninth Circuit departed from the accepted and usual course of judicial proceedings by failing to demonstrate it applied the appropriate de novo standard of review and by adopting a standard of causation in conflict with the purposes of the Lanham Act.

The Ninth Circuit failed to distinguish between the procedural posture of parties before it in Harper House and Jartran and petitioners. Both Harper

House and Jartran came before the Ninth Circuit after trial. The Ninth Circuit failed to permit petitioners the benefit of precedent. The Jartran presumption creates the inference on summary judgment that respondents' alleged deception caused petitioners' injury.

> The expenditure by a competitor or substantial funds in an effort to deceive consumers and influence their purchasing decisions justifies the existence of a presumption that consumers are, in fact, being deceived.

U-Haul Intern., Inc. v. Jartran, Inc., 793 F.2d 1034, 1041 (9th Cir. 1986). Likewise, the presumption should be applied on summary judgment to the fact of damage. As in tort law, this is a just result because of the

> practical unfairness of denying the injured person redress simply because he cannot prove how much damage each did, when it is certain that between them they did, let [the tortfeasors] be the one to apportion it among themselves. Since, then, the difficulty of proof is the reason, the rule should apply whenever the harm has plural causes and not merely that they acted in concert

Summers v. Tice, (1948) 33 Cal.2d 80, 85-86.

In fact, all respondents' sales in the rollout period were based upon a lie. Petitioners lost sales during that period. There was admissible evidence that those two events were causally connected. It was incorrect upon motion for summary judgment for the trial court to impose the additional burden upon petitioners to prove what properly should have been left for the determination by a jury upon weighing the evidence. Anderson v.

Liberty Lobby, Inc., (1986) 477 U.S. 242, 252.

> In sum, on a motion for summary judgment the responsibility of the district court is to determine if there are triable issues rather than to try those issues and make findings based on the affidavits and other materials accompanying the motion.

Country Floors, Inc. v. Gepner, supra, 930 F.2d at 1062.

Grants of summary judgment are properly viewed de novo. Kruso v. International Tel. & Tel. Corp., 872 F.2d 1416, 1421 (9th Cir. 1989), cert. denied, 110 S.Ct. 3217 (1990). The evidence must be viewed in the light most favorable to petitioners to determine whether there are any genuine issues of material fact and whether the district court correctly applied the law. Tzung v. State Farm Fire & Cas. Co., 873 F.2d 1338, 1339-40 (9th

Cir. 1989). All inferences of fact must be resolved against the movant for summary judgment [respondents] and in favor of the party opposing the motion [appellants]. 6 Moore's Federal Practice, Part 1, ¶ 56.15[3] at 56-255, 6 Moore's Federal Practice, Part 2, ¶ 56.27[1] at 56-854.

The Ninth Circuit's December 1, 1994 memorandum opinion does not indicate that the Court applied the appropriate de novo standard of review. The Court's endorsement of the trial court's failure to resolve issues of fact in favor of BMMG on summary judgment--despite the presence of expert testimony on causation, supported by lost profits' evidence, and its erroneous application of Harper House and Jartran II suggests it adopted a standard of causation in conflict with the purposes of the Lanham Act.

C. These proceedings involve a question of exceptional importance as the Ninth Circuit's decision frustrates the purposes of the Lanham Act, to protect the public from false and misleading advertising. In practical application, it denied petitioner equal protection under the Lanham Act and the Federal Rules.

The infomercial industry is rapidly growing in importance as measured by dollar volume and consumer influence. The Lanham Act is a consumer protection law. It is analogous to the Sherman Act. Like the Sherman Act, the Lanham Act seeks to protect consumers by preserving free and fair competition in the market. To that end, these laws properly restrict sharp business practices. The goal of promoting competition is not advanced, however, if the courts are permitted to abandon their mandate to check outlawed activity.

Congress has determined that false advertising is a particularly detrimental and egregious practice. The Ninth Circuit's decision seeks to undo the Lanham Act in a particularly cowardly fashion--by unpublished opinion. Further, the Ninth Circuit sanctioned the trial court's disregard of this Court's instructions regarding the proper administration of "summary judgment."

Certainly the scales of conscience and fair dealing are corrupted when a large and powerful participant in the infomercial market is permitted to profit by an intentional fraud. As the Jartran trial court put it

> to embrace its position would be to reward a commercial privateer and to encourage further predatory advertising practices in the business world.

U-Haul Intern., Inc. v. Jartran, Inc., (D.Arizona 1986) 601 F.Supp. 1140, 1145.

VI. CONCLUSION

By their nature these are questions where uniformity of decision is of great importance and the same questions has repeatedly been before the lower courts. Petitioner has been denied procedural and substantive rights. A conflict has been created among the Circuits and federal law has been ignored.

For all of the above-stated reasons, petitioners respectfully requests that a writ of certiorari issue, and that the decision of the Ninth Circuit be subject to full consideration and appropriate disposition by this Court.

Respectfully Submitted,

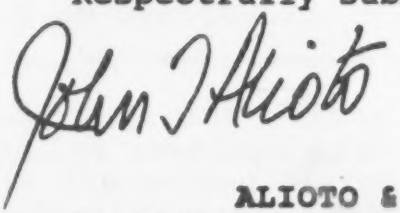

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TABLE OF CONTENTS

ORDER DENYING PETITION
FOR REHEARING EN BANC
Ninth Circuit Court of Appeal
Case No. 93-55892 1

Memorandum Decision of the
Ninth Circuit Court of Appeal
Case No. 93-55892 2

ORDER (GRANTING SUMMARY JUDGMENT)
Opinion by Hupp, J.
United States District Court
Central District of California
Case No. CV92-3308-HLH 6

FEDERAL RULES OF CIVIL PROCEDURE,
RULE 56 28

15 U.S.C. 1125 34

ORDER DENYING PETITION
FOR REHEARING EN BANC
Ninth Circuit Court of Appeal
Case No. 93-55892

The panel, as constituted in the above case, has voted to deny the petition for rehearing. Judges Hug and Poole have voted to reject the suggestion for rehearing en banc, and Judge Gibson has made no recommendation on the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no active judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

Memorandum Decision[1] of the Ninth Circuit Court of Appeal Case No. 93-55892

Before: GIBSON,[2] HUG and POOLE, Circuit Judges/

BMMG, Inc., Robert S. Mann, and Bob Mann's Malibu Gym, Inc., (collectively, "BMMG") appeal the district court's grant of summary judgment in favor of respondents. The dispositive issue on appeal is whether BMMG produced actual evidence of injury resulting from the respondents' alleged false advertising. See, Harper House, Inc. v. Thomas Nelson, Inc., 889 F.2d 197, 210 (9th Cir. 1989) (holding that actual evidence of some

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1. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

2. Honorable Floyd R. Gibson, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

injury resulting from deception is essential element of plaintiff's case). BMMG contends that Dr. Thomas' affidavit creates a genuine issue of fact as to causation. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

BMMG brought this suit seeking damages for lost profits under section 43(a) of the Lanham Act. To prevail, BMMG must prove that: 1) respondents attempted to sell its golf videos by making false statements; 2) respondents' false advertisement deceived a significant portion of the consuming public; and 3) BMMG's alleged injury resulted from the deception. Harper House, 889 F.2d at 208, 210. As we noted in Harper House, "[i]n a suit for damages under section 43(a) . . . actual evidence of some injury resulting from the deception is an essential element

of the plaintiff's case." Id. at 210.

Although Dr. Thomas' affidavit provides evidence that American Telecast's sales caused BMMG to lose sales, it does not link the loss of sales to the alleged deception. There is no evidence sufficient to create a genuine issue of material fact as to whether the alleged deception caused any injury to BMMG.

BMMG relies on U-Haul Intern., Inc. v. Jartran, Inc., 793 F.2d 1034 (9th Cir. 1986) in contending that it is entitled to a presumption that the alleged deception caused its injury. That case is clearly distinguishable. The presumption approved in Jartran was that the expenditure of substantial funds in an effort to deceive consumers gives rise to a presumption that the consumers are in fact deceived. Id. at 1041. This presumption does not extend

to justify a finding that a competitor is injured by the deception. As we noted in Harper House, the plaintiffs in the Jartran case had presented evidence that Jartran's deceptive advertising injured U-Haul. Harper House, 889 F.2d at 208-209. The plaintiffs in Jartran used actual evidence, not a legal presumption, to prove the injury element of their case.

In the case at hand, the district court correctly found that there was no evidence that BMMG lost any sales due to American Telecast's alleged deception. The causal link is missing. Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

//

ORDER (GRANTING SUMMARY JUDGMENT)
Opinion by Hupp, J.
United States District Court
Central District of California
Case No. CV92-3308-HLH

This matter was submitted following oral argument on 5/3/93. It is now decided as set forth below. The motion for summary judgment is granted. Judgment is rendered that plaintiffs take nothing in this action.

In this Lanham Act and state law tort action, plaintiffs contend that defendants' golf "infomercial" contained false representations, to plaintiffs' damage. While the pleaded false representations were multiple, plaintiffs defend this motion for summary judgment on the basis of two arguments: --that the celebrity endorsers Rogers and Summerall

lied when they told the television audience that the sold instruction tapes being sold had enormously helped their games when in fact the tapes had not even been made when Rogers and Summerall spoke, and thus could not have been seen, much less have helped their games -- and that the infomercial as a whole repeatedly asserts a related falsehood that the tapes are in existence at the time the infomercial ran. The infomercial ran for a period of time ("test marketing" according to defendant) before the product (the tapes) was actually made. The tapes were then observed by Rogers and Summerall, who renewed or ratified their endorsements of the tapes. In the meantime, significant sales orders for the tapes (6 hours worth for $150) were generated. Plaintiffs, who also

advertised a golf instruction tape by infomercial (1-1/2 hours for $39), claim that its sales were reduced by the false advertising, and seek damages.

Defendants, for reasons not clear to the court in view of the clear evidence of falsity as to the statements of Summerall and Rogers prior to their ratification after seeing the tapes, seek summary judgment on the liability aspects of the Summerall-Rogers falsehoods as well as on the damage aspects. First, defendants assert that the statements of Rogers and Summerall are not actually false. However, since both Rogers inferentially and Summerall expressly give the then non-existent tapes credit for improving their individual golf games (not the general nature of Armstrong's techniques or

earlier tapes they may have seen), this contention has no merit. Second defendant say that the false statements did not mislead customers as to the nature and characteristics of the videotapes. This argument has no merit since the tapes were being sold in part by the utilization of a falsehood --that they had improved the endorsers' golf game. Third, it is argued that the endorsers' statements were mere puffery. Part of the statements surely were that, and are not actionable, but the label "mere puffery" cannot be used to cover over a false statement of fact. Fourth, it is argued that any falsity in the statements was "cured" by their reendorsement after the tapes were viewed by Rogers and Summerall. The ratification may well (the court assumes so for purposes of this motion) make the

infomercials not false when broadcast from that point on, but does not "cure" the problem that large numbers of orders were taken and filled resulting from the original infomercials with the false statements. To argue that the statements were true when the orders were shipped is sophistry--the orders were sent in potential reliance on a lie. The later ratification by Summerall and Rogers could only go to validate orders sent as a result of showing the infomercial after the date of ratification. Fifth, it is posited that the original infomercial was mere "testing marketing", which should not count. This argument has the least merit at all. There is no more warrant for lying in test marketing than there is at any other time. In addition, substantial sales seem to have been made as a result

of "test marketing" (plaintiff claims in excess of $7,000,000). Thus, the court denies the motion for summary judgment based on a theory that plaintiff cannot show violations of the Lanham Act with respect to the statements of Summerall and Rogers prior to their ratification of the endorsement of the tapes after seeing them. The court does not determine who was responsible for the falsity identified; apparently both Rogers and Summerall in their depositions stated that they thought that the tapes they were endorsing were previously produced tapes of Armstrong, not the new then non-existent tapes which were sold through the infomercial.

At oral argument, the plaintiff argued forcefully that the falsehoods went

further and infected the whole of the infomercial. This argument is then the basis for a further argument that the sufficiency of the damage evidence should be judged in light not merely of the Summerall-Rogers falsehoods before ratification, but in light of the effect of the whole infomercial. In making this argument, plaintiffs do not distinguish between the effect of the infomercial broadcast before the tapes were done (from Dec. 1991 to March 1992) and those broadcast thereafter. The court submitted the matter so it could further review the material submitted to see if there was a triable issue of fact in this argument. It is concluded that there is not. The evidence shows that the infomercial was produced before the tapes that it advertises. The infomercial was broadcast

starting the first week of Dec. 1991, and ran continuously thereafter. The tapes advertised were produced between then and the end of March 1992. The orders from the early infomercials were not filled until the production of the tapes was complete, and those who submitted early orders were given an opportunity to have their money returned. Plaintiffs charge that there was no intention to produce the tapes until it was seen that there was a worthwhile number of orders, but there was no evidence to support this charge. A reading of the transcript of the infomercial shows that there is never (except by Summerall expressly and Rogers impliedly) an express statement that the tapes are done and ready to ship. There are extensive statements as to what will be shown by the tapes. These statements

are couched in terms of which of Armstrong's concepts and methods are revealed by the tapes. There is not sufficient evidence to show a misrepresentation. There is no allegation that the tapes do not in fact depict Armstrong's techniques and teach his theories. The court thus rejects the plaintiffs' proposition that there is sufficient evidence to take to a jury a contention that the whole infomercial is one long fraudulent statement. If the product is in production, and is intended to be produced and sold to those who order it, and the product meets the description of it in the advertisement, no inference of fraud arises because it is not on the shelf when the advertisement is run. Thus, the summary judgment motion must be considered alone on the circumstances of

the representation by Summerall and Rogers.

That leads to the subject of damages, specifically whether plaintiff can show that at least some damages were caused by the false part of the infomercial. In considering this question, certain additional non-controverted facts are relevant. There is a sizeable market in golf instruction videotapes. Hundreds of versions are on the market. They are available through video stores, sporting goods stores, pro shops, department stores, and are widely advertised in the magazine and newspaper media. The infomercial is only one means of advertising and marketing of golf instructional tapes. Thus, there being multiple factors in the market, the cause

of success or failure of one product cannot be measured by a simple two party comparison. In addition, the instructional videotapes come in varying length and cost, as illustrated by the $150 6-hour defendant tapes and the 1/1/2 hour $39 plaintiff tape. Numerous market factors make it difficult to compare one with the other. Plaintiffs say that only plaintiffs and defendants use the infomercial method of advertising; this may be so but does not create a specialized sub-market. Obviously, plaintiffs and defendants must compete with all other golf instructional products using differing media for advertising. Plaintiffs have not submitted a declaration of an expert economist refuting this common sense analysis.

In addition, there is a question as to how much the false statements contributed to the success of defendants' product. The statements were made by well-known celebrities, but were only a small part of the presentation by the celebrities, which, in turn, was only a small part of the infomercial in which Armstrong demonstrated his theories and techniques.

The summary judgment motion challenges plaintiffs (who have the ultimate burden of proof on this issue) to come up with evidence to show that the falsity as to which an issue is shown caused a diminution of plaintiffs' sales. Here, it is important to note that we are considering the causal connection between the falsity and the claimed drop in sales,

not the connection, if any, between defendants overall sales and the drop in plaintiffs' sales. (Harper House 9Cir''89 889 F2d 197, 210.) This requires plaintiffs to have proof of some degree that the false statements of Summerall and Rogers during the period of falsity (to the effect that the tapes had improved their game) caused a loss of plaintiffs' sales. There is no such proof. Plaintiffs all through their opposition assume that what they are comparing is whether the Armstrong infomercial caused a diminution in plaintiffs' sales; as seen above, this is not so. Armstrong has the right to compete using the infomercial technique; if he has built a better mousetrap, plaintiffs may not complain. The whole theory of the opposition is therefore undercut, since in large part it

seems to be based on the theory that its causation argument is based on defendants' sales, not the effect, if any, of the falsities as to which an issue of fact is shown.

Plaintiffs offer three items in support of their causation theory. First, it is argued that the "single source" exception to the need to prove causation applies. So far as the court can tell, the idea behind this argument is that when there are only two suppliers of a product, the increased sales of one is enough to prove that such was the cause of decreased sales of the other. Whatever the merits of this theory in the situation assumed, the theory plainly cannot apply here, for two reasons. There are multiple golf instruction videos on the market and thus

there are multiple possible causes of a change in the market position. Further, in this case, there are multiple differences between the method of marketing the two products here--price, quantity, possibility quality--which can account for the differences along with the misrepresentation alleged. Thus, the single source "rule", which might have relevance in a two source market dealing with a fungible product, can have no application here.

The second argument is that a Mr. Marsh, an executive of defendants, spoke with plaintiffs on 3/2/92 and said that he understood that defendants' infomercial would reduce plaintiffs' business. From what is said above, it is easy to see that the answer to this is "so what?"

Certainly, increased sales of one product might possibly hurt sales of another product. The question, however is to what extent did the false statements in the endorsements hurt sales of plaintiffs' product, and the admission does not cover that.

The third ground of opposition to the causation argument is the opinion evidence of Dr. Thomas, an apparently qualified expert, that causation is present. Defendants challenge at the threshold the admissability of Dr. Thomas' declaration because Dr. Thomas was not listed as an expert on the time schedule provided by Local Rule 9. To the court, this is a serious challenge, since "game playing" with expert identity for the purpose of preventing proper preparation of the case

by the opponents is an evil which should be stamped out in our courts. Here, there appear to be some ameliorating factors which make it unclear whether Dr. Thomas ultimately would be allowed to testify as an expert in the trial. Apparently plaintiff and defendant, without the authority of the court, have agreed among themselves that expert depositions will be conducted after the discovery cut-off (which passed 4/1/93) and indeed after the date of the argument on this motion. The court does not approve of such agreements but will not interfere with the voluntary action of counsel in living up to them without the necessity of a court order. Thus, there is the possibility that defendant will not be prejudiced by the late designation of Dr. Thomas. Further, Dr. Thomas apparently relies on material,

including extensive depositions of employees of the plaintiff, which has been delivered to defendants (defendants appear to dispute this in part). It therefore appears that any prejudice from the late notification may have been largely dissipated on the facts of this case. With this picture, the court does not know now that Dr. Thomas would be excluded from testifying at trial. Since there is a potential that he will so testify, his declaration is considered on this summary judgment motion.

In considering the declaration of Dr. Thomas on the merits of this motion, it is immediately apparent that his basic assumption (given to him by counsel) is that he is to compare the sales generated by the defendants' infomercial with any

drop in sales by plaintiffs to see if the one was the cause of the other. He opines that there is such a causal connection. This would be sufficient to establish a triable issue of fact if that comparison was relevant on this motion, but it is not. Rather than look to the entire infomercial run by the defendants, it is necessary to look at the causal connection between the falsities in the statements of Summerall and Rogers, until cured by ratification, with the decrease in the sales of the plaintiffs. No attempt has been made to do this. Since it is the diminution in sales caused by the falsities which is at issue, there is no evidence that the falsities as to which there is sufficient evidence to provide an issue of fact caused any damage.

There being no evidence that the false advertising caused any damage, judgment must be entered in the Lanham Act claim.

The court assumes that there is diversity jurisdiction; otherwise the state law claims would be merely dismissed with the dismissal of the only federal claim. The state claims are partially resolved by the above determination. The common law unfair competition claim must be dismissed for the same reason as the Lanham Act claim. There is no private damage action under Cal. B&P Code §§ 17200 or 17500. Whether or not "disgorgement" (an equitable remedy) is only available to the Attorney General or not, plaintiffs here are seeking to measure it by their loss of sales, but, as seen, they have not

shown any causation. The claims for interference with contractual relations or with prospective business advantage fail because there is no showing of any existing contractual relationships or established business relationships with which defendants interfered. In addition, the causation of damages as attributed to false statements cannot be shown.

There are no viable claims to be tried. Summary judgment is granted.

IT IS FURTHER ORDERED that the Pre-Trial Conference now set for Friday, May 7, 1993 is Off Calendar. Counsel for defendants is directed to prepare form of Judgment in accordance with this Court's ruling.

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as

to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule

judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's

response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of

the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

TITLE 15. COMMERCE AND TRADE

CHAPTER 22. TRADE-MARKS

GENERAL PROVISIONS

15 U.S.C. §1125. False designations of origin and false descriptions forbidden

(a) Civil action.

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which--

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship,

or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

(2) As used in this subsection, the term "any person" includes any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this Act in the same manner and to the same extent as any

nongovernmental entity.

(b) Importation. Any goods marked or labeled in contravention of the provisions of this section shall not be imported into the United States or admitted to entry at any customhouse of the United States. The owner, importer, or consignee of goods refused entry at any customhouse under this section may have any recourse by protest or appeal that is given under the customs revenue laws or may have the remedy given by this Act in cases involving goods refused entry or seized.

CERTIFICATE OF SERVICE

I declare that I am over the age of eighteen years and not a party to the within action. My business address is 505 Montgomery Street, 16th Floor, San Francisco, California 94111.

On May 8, 1995, I served the following document(s):

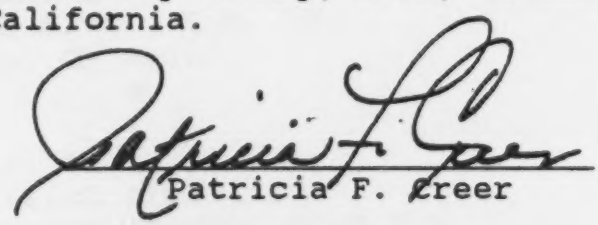
APPENDIX TO PETITION FOR WRIT OF CERTIORARI

---

by placing three true and correct copies thereof in a sealed envelope with postage fully prepaid in the United States Mail at San Francisco, California, addressed as follows:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury the foregoing to be true and correct. Executed this 8th day of May, 1995, at San Francisco, California.



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(3)

No. 94-1848

In The

Supreme Court of the United States

October Term, 1994

BMMG, INC., a California corporation; ROBERT S. MANN, an individual; and BOB MANN'S MALIBU GYM, INC., a California corporation,

Petitioners,

vs.

AMERICAN TELECAST CORPORATION, a Pennsylvania corporation; WALLY ARMSTRONG GOLF, INC., a Pennsylvania corporation; WALLY ARMSTRONG, an individual; KENNETH ROGERS aka KENNY ROGERS, an individual; and GEORGE SUMMERALL aka PAT SUMMERALL, an individual,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. Whether Petitioners successfully may oppose summary judgment in a Lanham Act action for damages by relying solely on an *inference* of harm from Respondents' non-comparative advertisement absent any *evidence* that the advertisement's alleged falsehoods resulted in a single lost sale to Petitioners.

2. Whether the District Court, in a Lanham Act action between competitors for damages based upon allegedly false advertisements, properly rejected Petitioners' argument that the relevant market consisted of only two companies where Petitioners conceded (a) that there are numerous sources for the product and (b) that a product sold or advertised through any marketing channel potentially competes with a product advertised or sold through any other channel.

LIST OF RESPONDENTS' PARENT COMPANIES AND PARTIALLY OWNED SUBSIDIARIES
(Sup. Ct. Rule 29.1)

Respondent American Telecast Corporation has no wholly owned or partially owned subsidiaries. Wally Armstrong Golf, Inc. has no wholly owned or partially owned subsidiaries. There are no parent companies of either American Telecast Corporation or Wally Armstrong Golf, Inc.

TABLE OF CONTENTS

Page

I. STATEMENT OF THE CASE 1

A. The Underlying Facts 1

B. The District Court Ruling 4

C. The Ninth Circuit Ruling 5

II. MISSTATEMENTS OF FACT IN THE PETITION 6

III. REASONS WHY THE PETITION SHOULD BE DENIED 11

A. The Courts Below Did Not Deny Petitioners Due Process And Equal Protection By Requiring Them To Raise A Genuine Issue of Material Fact That Misrepresentations In Respondents' Infomercial Caused Lost Sales To Petitioners 11

B. There Is No Conflict Between The Circuits Regarding The Determination Of The Relevant Market Under The Lanham Act 16

C. This Case Presents No Special Or Important Reason To Address The Purposes Or Application Of The Lanham Act 18

IV. CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

CASES:

Alpo Petfoods v. Ralston Purina Co., 913 F.2d 958 (D.C. Cir. 1990) 12

Burndy Corp. v. Teledyne, Inc., 584 F. Supp. 656 (D. Conn.), *aff'd*, 748 F.2d 767 (2d Cir. 1984) 12, 16

Can-Am Engineering Co. v. Henderson Glass, Inc., 814 F.2d 253 (6th Cir. 1987) 14

Coca-Cola Co. v. Tropicana Products, Inc., 690 F.2d 312 (2d Cir. 1982) 13

Country Floors, Inc. v. Gepner, 930 F.2d 1056 (3d Cir. 1991) 16, 17, 18

Data Cash Systems, Inc. v. JS&A Group, Inc., 223 U.S.P.Q. 865 (N.D. Ill. 1984) 8

Electronics Corp. of America v. Honeywell, Inc., 428 F.2d 191 (1st Cir. 1970) 18

FTC v. Figgie Int'l, 994 F.2d 595 (9th Cir. 1983) *cert. denied*, ___ U.S. ___, 114 S. Ct. 1051, 127 L. Ed. 2d 373 (1994) 14

Grant Airmass Corp. v. Gaymar Industries, Inc., 645 F. Supp. 1507 (S.D.N.Y. 1986) 15

Harper House, Inc. v. Thomas Nelson, Inc., 889 F.2d 197 (9th Cir. 1989) 7, 11, 12, 13, 14, 16

In re All Terrain Vehicle Litigation, 771 F. Supp. 1057 (C.D. Cal. 1991), *aff'd*, 979 F.2d 755 (9th Cir. 1992) 8

Johnson & Johnson v. Carter-Wallace, Inc., 631 F.2d 186 (2d Cir. 1980) 12

TABLE OF AUTHORITIES – Continued

Page(s)

Lindy Pen Co. v. Bic Pen Corp., 725 F.2d 1240 (9th Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985) 9

Marcyan v. Nissen Corp., 1578 F. Supp. 485 (N.D. Ind. 1982), *aff'd w/o opin.*, 725 F. 2d 687 (7th Cir. 1983) 8

Otis Clapp & Son, Inc. v. Filmore Vitamin Co., 754 F.2d 738 (7th Cir. 1985) 16

Sheldon Friedlich Marketing v. Carol Wright Sales, 219 U.S.P.Q. 883 (S.D.N.Y. 1983) 7

Summers v. Tice, 33 Cal. 2d 80 (1948) 7, 15

Toro Co. v. Textron, Inc., 499 F. Supp. 241 (D. Del. 1980) 14

Tripledge Products, Inc. v. Whitney Resources, Ltd., 735 F. Supp. 1154 (E.D.N.Y. 1990) 7

U-Haul International, Inc. v. Jartran, Inc., 601 F. Supp. 1140 (D. Ariz. 1984), *aff'd*, 793 F.2d 1034 (9th Cir. 1986) 13

Vidal Sassoon v. Bristol-Myers, 661 F.2d 272 (2d Cir. 1981) 13

TREATISES:

2 J.T. McCarthy, *McCarthy on Trademarks and Unfair Competition* § 27.04 (3d ed. 1995) 11

2 J.T. McCarthy, *McCarthy on Trademarks and Unfair Competition* § 27.05 (3d ed. 1995) 12

Respondents American Telecast Corporation ("ATC"), Wally Armstrong Golf, Inc. ("WAGI"), Wally Armstrong ("Armstrong"), Kenneth Rogers aka Kenny Rogers ("Rogers") and George Summerall aka Pat Summerall ("Summerall") (collectively "Respondents") oppose the Petition for Writ of Certiorari filed by Petitioners BMMG, Inc., Robert S. Mann and Bob Mann's Malibu Gym, Inc. (collectively "Petitioners"). Petitioners do not, and cannot, show any special or important reason for this Court to review this ruling against them in an unreported memorandum decision by a unanimous panel of the United States Court of Appeals for the Ninth Circuit.

I. STATEMENT OF THE CASE

A. The Underlying Facts

Petitioner Robert S. Mann ("Mann") is a self-styled fitness expert. Since 1982, Mann, through various companies, including BMMG, Inc. and Bob Mann's Malibu Gym, Inc. (collectively "Petitioners"), has sold inexpensive videotapes on such subjects as fitness training, karate lessons and golf instruction. One of Petitioners' products, a videotape known as "Bob Mann's Automatic Golf," has been sold in retail stores and through mail order for prices ranging from $3.99 to $12.95. The tape also was offered in a multi-tape package through a program-length television commercial, commonly known as an "infomercial," for about $40.

Respondent Wally Armstrong, on the other hand, is one of the country's foremost professional golf instructors. Since 1985, Armstrong has been incorporating his

instructional techniques and specialized training aids into a series of videotapes, including a six-tape video library designed *for golf instructors*. For many years, he dreamed about putting his best ideas, techniques and teaching aids into a comprehensive video training aid package *for consumers*.

At the same time, Respondent ATC, a leading producer of telemarketing products, believed there was a market for a "high-end" set of golf instructional videotapes. In early 1991, ATC began working with Armstrong to develop and produce a package consisting of training aids and videotapes that would incorporate Armstrong's teaching techniques.

Armstrong teamed with sports journalist Pat Summerall and country music recording artist Kenny Rogers, both of whom are avid golfers. After Armstrong showed his then-existing tapes and demonstrated his teaching techniques to them, both Summerall and Rogers agreed to endorse Armstrong's videotape project and appear in an infomercial to market the package.

To gauge the demand for Armstrong's golf instructional package and thereby assess what level of capital investment the proposed manufacturing and distribution of the product could support, Respondents produced an infomercial which was test marketed with five broadcasts in December 1991. The results were overwhelmingly positive. Respondents then decided to invest more than $450,000 in a golf instructional videotape and training aids package which would and did sell for about $150.

Though the golf instructional package was being prepared when the infomercial was "rolled out" on national cable networks in late February 1992, it is uncontroverted that consumers, who had ordered the package during the test marketing program, did not have their credit cards processed until after the package was shipped in March of 1992.

Upon inspecting the package soon after it was completed, Rogers and Summerall were thrilled with the final product and enthusiastically ratified their earlier endorsements. Even Petitioners conceded before the District Court that the final product is superior to Armstrong's previous tapes.

Once Respondents' infomercial began airing regularly, Petitioners stopped purchasing air time for their infomercial. Despite the huge disparity in price between Petitioners' and Respondents' videotapes, Petitioners apparently imagined a competitive threat from Respondents. Rather than compete in the marketplace, however, Petitioners seized on what they claimed were material "misrepresentations" *about Respondents' own products* in Respondents' infomercial and sought to use the judicial system to block out the new market entrants and to extract millions of dollars from them. To implement their plan, Petitioners filed a lawsuit against Respondents alleging that Respondents' infomercial contained false representations in violation of the federal Lanham Act and state unfair competition laws.

Respondents' 28-1/2 minute infomercial does not mention or depict Petitioners, Petitioners' product or any of the hundreds of competing golf instructional products in the marketplace. Instead, the infomercial provides an

extended review of Armstrong's golf instructional techniques and includes endorsements by the Respondent celebrities. The endorsements were based on the celebrities' personal knowledge of Armstrong's teaching techniques and training aids through private instruction and through viewing Armstrong's then-existing instructional videotapes. Although Petitioners claim these endorsements were "premature," because Respondents' golf instructional package for consumers had not been completely assembled when the infomercial was first broadcast, the celebrities re-endorsed Respondents' finished product at about the time it was first shipped to consumers. *Consumers received exactly what was advertised.*

Respondents' infomercial clearly did not contain any factual misrepresentations that materially harmed *the public*. Accordingly, Petitioners are not suing as "vicarious avengers" of defrauded consumers.

Instead, Petitioners are litigating *only* in their own self interest as supposed competitors of Respondents, and claim millions of dollars in damages based on their alleged lost profits. After conducting extensive discovery, however, Petitioners did not come up with a shred of evidence that a single consumer bought Respondents' golf instructional package rather than Petitioners' videotapes, much less that any consumer was motivated to buy Respondents' product based on the alleged misrepresentations in Respondents' infomercial.

B. The District Court Ruling

At the conclusion of discovery, Respondents moved for summary judgment, arguing that none of the alleged

misrepresentations in Respondents' infomercial were material and that Petitioners had presented no evidence of *actual injury* resulting from any alleged misrepresentations.

Petitioners opposed Respondents' motion by presenting the testimony of a purported economics expert, Scott Thomas. Thomas, however, only attempted to prove that the commencement of Respondents' advertising campaign led to a drop in Petitioners' sales. Thomas did not even attempt to meet Petitioners' burden of showing that that result is explained by alleged falsehoods rather than increased competition. Without evidence that a single person actually bought Respondents' golf instructional package rather than Petitioners' videotapes due to the alleged misrepresentations in Respondents' infomercial, Petitioners were forced to resort to "fictions," *viz.*, legal presumptions, to try to create "damages" where none exist.

Finding no evidence that Petitioners were injured by Respondents' alleged misrepresentations, the District Court granted Respondents summary judgment on Petitioners' complaint.

C. The Ninth Circuit Ruling

In an unpublished memorandum entered on December 1, 1994, a unanimous panel of the Ninth Circuit affirmed the District Court's judgment. The panel ruled that "[t]he dispositive issue on appeal is whether [Petitioners] produced actual evidence of injury resulting from the Respondents' alleged false advertising." (Appendix to Petition for Writ of Certiorari ("App.") at

2.) The appellate court concluded that there was no "causal link" between Petitioners' alleged lost sales and Respondents' alleged deception. (*Id.* at 5.)

On February 7, 1995, the same panel voted to deny Petitioners' Petition for Rehearing, and no active judge of the Ninth Circuit requested a vote on Petitioners' suggestion for an *en banc* hearing.

II. MISSTATEMENTS OF FACT IN THE PETITION

Pursuant to Supreme Court Rule 15, this section identifies material misstatements of fact in the Petition for Writ of Certiorari ("Pet.").[1]

Petitioners' statement of the first purported Question Presented is based on an incorrect premise, namely, that Respondents' infomercial is "a completely false advertisement, *e.g.*, an advertisement which promotes that which does not exist. . . . " (Pet. at 4.) While it is true that the first few times Respondents' infomercial was broadcast for test marketing purposes, Respondents' golf instructional package had not been put in its final form, that does not render the infomercial "completely false" or otherwise violate the Lanham Act.

Indeed, Petitioners *conceded* before the District Court that the "use of infomercials to test market products is an accepted industry-wide practice." Petitioners also did not controvert that consumers who ordered Respondents' package during the test marketing program were not

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[1] Petitioners' misstatements of law are addressed in Part III, *infra*.

defrauded because they were given the option of cancelling their order (if they chose not to wait until the package was completed and shipped) and their credit cards were not charged until after the package was shipped. (Respondents' Undisputed Fact Nos. 23, 21.)

Moreover, there is no prohibition against commencing an advertising campaign before completing the advertised product. *See, e.g., Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197 (9th Cir. 1989) (prototype advertised; alleged Lanham Act violation arose not from the defendants commencing an advertising campaign before the final product completed, but rather from advertising a different product than the one actually delivered); *Tripledge Products, Inc. v. Whitney Resources, Ltd.*, 735 F. Supp. 1154 (E.D.N.Y. 1990) (ad violated Lanham Act not because the defendant "was accepting orders without having *any* inventory stock whatsoever" (emphasis in original), but because it misleadingly depicted parts not being offered for sale); *Sheldon Friedlich Marketing v. Carol Wright Sales*, 219 U.S.P.Q. 883 (S.D.N.Y. 1983) (no Lanham Act concerns raised by test marketing a proposed product with ads containing photograph of prototype).[2]

Petitioners' description of Respondents' infomercial (Pet. at 7-8) also contains numerous misstatements. Respondents' infomercial consisted of a nearly half-hour

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[2] Revealingly, Petitioners ignore *Tripledge Products, Sheldon Friedlich Marketing* and other cases that specifically address the issues relevant to this case, in favor of inapplicable authorities such as *Summers v. Tice*, 33 Cal. 2d 80 (1948), a 47-year-old state court case dealing with joint tortfeasor liability. *See* page 15, *infra*.

presentation of Armstrong's golf instructional techniques along with about a minute of celebrity endorsements. Although Petitioners now contend the celebrities endorsed non-existent tapes, Petitioners *conceded* before the District Court that, in Respondents' infomercial, the celebrities endorsed Armstrong's golf instructional *techniques*, not any particular videotape. (Respondents' Undisputed Fact No. 11.)[3]

Petitioners also claim Respondents' infomercial promised a "revolutionary" and "breakthrough" technique whereby the source of a golfer's power is in the wrists rather than the legs. To the contrary, Respondents' breakthrough technique was Armstrong's use of simple instructional aids such as coat hanger and sponge devices that can be used along with videotapes to teach a proper golf swing. In any event, the emphasis placed by an instructor on one part of his body over another in order to teach a powerful golf swing are generalized statements that do not comprise the type of factual misrepresentations actionable under the Lanham Act. *See, e.g., In re All Terrain Vehicle Litigation*, 771 F. Supp. 1057, 1060-61 (C.D.

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[3] Petitioners also did not dispute that the celebrities ultimately reaffirmed their endorsements once they inspected the finished product. Accordingly, Petitioners necessarily conceded that the endorsements were, at most, only premature, not false. *See Marcyan v. Nissen Corp.*, 578 F. Supp. 485, 507 (N.D. Ind. 1982), *aff'd w/o opin.*, 725 F. 2d 687 (7th Cir. 1983) ("Plaintiffs have not offered one shred of evidence that [the endorser] in any way disagrees with the statement in the endorsement or that it is not true. Accordingly, there is no 'false statement.' "); *Data Cash Systems, Inc. v. JS&A Group, Inc.*, 223 U.S.P.Q. 865, 867 (N.D. Ill. 1984) (although the defendant's original ad implied a nonexistent celebrity endorsement, no Lanham Act violation because the celebrity eventually did endorse the product).

Cal. 1991), *aff'd*, 979 F.2d 755 (9th Cir. 1992) (statement that so-called "all terrain vehicles" are "precisely balanced in the frame for superb handling" held, as a matter of law, not actionable).

Petitioners state that when Respondents' infomercial was broadcast, "Petitioners' sales took a dramatic plunge." (Pet. at 9.) This fact alone (if it be a fact) is grossly misleading because it fails to demonstrate that Petitioners lost a single sale *due to any misrepresentations in Respondents' infomercial*, ~~rather~~ than to competition or Petitioners' own marketing decisions. *See Lindy Pen Co. v. Bic Pen Corp.*, 725 F.2d 1240, 1244 n.2 (9th Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985) (rejecting plaintiff's argument that actual confusion from defendant's trademark infringement can be inferred from evidence that plaintiff's sales dropped once defendant began marketing its competing product).

Petitioners suggest, without any support whatsoever, that Respondents' minor editing of their infomercial in July 1992, in response to Petitioners' complaints, resulted in Petitioners being "able to reenter the infomercial market in September 1992. . . . " (Pet. at 10-11.) Nothing, however, prevented Petitioners from "reentering" the infomercial market at any time. The fact that Petitioners deliberately chose not to advertise their product during the first half of 1992, when Respondents' infomercial was being heavily broadcast, is *not* evidence that Petitioners

were damaged by Respondents' alleged misrepresentations.

Petitioners suggest that the District Court granted Respondents summary judgment despite Petitioners "controverting nearly a dozen of Respondents' allegedly undisputed facts. . . . " (Pet. at 12.) In fact, the District Court made no finding to that effect. Instead, the District Court focused on the key element of causation and held that Petitioners failed to raise a triable issue that Respondents' alleged misrepresentations resulted in any damage to Petitioners. (App. at 15-25.)

Petitioners refer to the testimony of their purported expert, "Dr. Thomas Scott" [sic, Scott Thomas], and state: "The Ninth Circuit misstates the record when it concluded that Petitioners solely relied on comparative sales data." (Pet. at 17.) It is Petitioners who misstate the record. The Ninth Circuit expressly reviewed Dr. Thomas' affidavit and analysis, as well as Petitioners' attempt to rely on judicially-created presumptions of injury. (App. at 3-5.)

Petitioners next claim "[t]here was evidence that at least *some* of [Respondents'] sales were at the expense of Petitioners' sales." (Pet. at 18, emphasis in original.) Petitioners also state that "[t]here was admissible evidence that [Respondents' sales and Petitioners' alleged lost sales] were causally connected." (Pet. at 22.) Yet, even if Petitioners' so-called "evidence" somehow links the two companies' sales performance, this is not the *relevant* inquiry in a false advertising claim. The Ninth Circuit correctly found "[t]here is no evidence sufficient to create a genuine issue of material fact as to whether the alleged

deception caused any injury to [Petitioners]." (App. at 4, emphasis in original.)

III. REASONS WHY THE PETITION SHOULD BE DENIED

A. The Courts Below Did Not Deny Petitioners Due Process And Equal Protection By Requiring Them To Raise A Genuine Issue of Material Fact That Misrepresentations In Respondents' Infomercial Caused Lost Sales To Petitioners

Although Petitioners assert, at least twice, that they were denied due process and equal protection of the laws, they never explain how that is so. (Pet. at 13-14, 25-27.) As near as Respondents can make out, Petitioners apparently claim both the District Court and the Ninth Circuit deprived Petitioners of their rights by requiring them to raise a triable issue of fact supporting a causal link between Respondents' alleged misrepresentations and Petitioners' alleged lost sales. But that requirement is neither unfair nor improper: it is fundamental in a Lanham Act action seeking damages.

Unlike injunctive relief, which, to protect the consumer, may be awarded even where the likely impact of the defendant's false advertising is subtle and slight, money damages "primarily aid only the competitor, and he is required to satisfy a much higher standard of proof as to injury in order to recover damages." 2 J.T. McCarthy, *McCarthy on Trademarks and Unfair Competition* § 27.04[3][d] at 27-46 (3d ed. 1995) (*"McCarthy"*), *citing Harper House, supra*. The reason for requiring the plaintiff to prove actual loss (not a mere likelihood of harm) to

recover damages is to ensure that he does not reap a windfall. *Johnson & Johnson v. Carter-Wallace, Inc.*, 631 F.2d 186, 192 (2d Cir. 1980).

To meet his burden, the plaintiff must show "actual evidence of some injury *resulting from the deception . . . .*" *Harper House*, 889 F.2d at 210 (emphasis in original). Put another way, the plaintiff must prove that, "[b]ut for [the defendant's] misrepresentation, the sales made by the defendant would have been made by the plaintiff." *Burndy Corp. v. Teledyne, Inc.*, 584 F. Supp. 656, 665 (D. Conn.), *aff'd*, 748 F.2d 767 (2d Cir. 1984); *Johnson & Johnson*, 631 F.2d at 191 (monetary relief barred due to plaintiff's "inability to point to a definite amount of sales lost *to [defendant]*") (emphasis in original); *Alpo Petfoods v. Ralston Purina Co.*, 913 F.2d 958, 969 (DC Cir. 1990) (actual damages measured by "profits lost by the plaintiff on sales actually diverted to the false advertiser").

Thus,

> [Petitioners] must prove that at least some customers have been actually deceived and that [Petitioners have] been injured by actual consumer reliance on the false advertising. Such actual deception and resulting customer reliance can be proven not only by evidence of actual diversion of sales to [Respondents], but actual deception can be shown by customer surveys or by testimony of a dealer, distributor or customer.

2 *McCarthy* § 27.05[2][a] at 27-57.

Here, *Petitioners have no direct evidence* of actual diversion of sales, *i.e.*, that a single consumer saw both parties' infomercials and bought Respondents' product rather

than Petitioners' because he was deceived by Respondents' alleged misrepresentations. *Nor do Petitioners have any circumstantial evidence* of lost sales or consumer deception such as the consumer surveys upon which other Lanham Act plaintiffs typically have relied. *See, e.g., U-Haul International, Inc. v. Jartran, Inc.*, 601 F. Supp. 1140, 1148-49 (D. Ariz. 1984), *aff'd*, 793 F.2d 1034 (9th Cir. 1986); *Johnson & Johnson*, 631 F.2d at 191; *Vidal Sassoon v. Bristol-Myers*, 661 F.2d 272, 276-78 (2d Cir. 1981); *Coca-Cola Co. v. Tropicana Products, Inc.*, 690 F.2d 312, 317 (2d Cir. 1982) (consumer survey "provided the causative link between the advertisement and the plaintiff's potential lost sales").

Instead of evidence, Petitioners attempt to rely on an inapplicable legal presumption they find in the *Jartran* opinion. In *Jartran*, the Ninth Circuit held that, where the defendant is found to have engaged in intentional deception in the context of a comparative ad, consumers are presumed to have been deceived. 793 F.2d at 1041. *Harper House* applied this presumption to a situation where a jury found the defendants intentionally deceived consumers "into purchasing a product different than that advertised . . . . " 889 F.2d at 209.

The present case is easily distinguishable: it involves neither a comparative ad nor a situation in which consumers received a product different than that advertised. Thus, the *Jartran* presumption of consumer deception does not apply.

Moreover, even assuming *arguendo* an issue of fact as to whether consumers were deceived, the *Jartran* presumption does *not* excuse Petitioners from proof that

Respondents' allegedly deceptive advertisement caused Petitioners harm. *Harper House*, 889 F.2d at 209 (despite presuming consumers were deceived, no presumption that plaintiff had been injured); *FTC v. Figgie Int'l*, 994 F.2d 595, 606 (9th Cir. 1983) *cert. denied*, ___ U.S. ___, 114 S. Ct. 1051, 127 L. Ed. 2d 373 (1994) (no presumption that consumers would have bought plaintiff's product or any product at all, rather than defendant's). As the Ninth Circuit correctly found, Petitioners have no such proof. (App. at 4-5.)

Instead, Petitioner Bob Mann proffers only (a) his self-serving declaration that Respondents' infomercial caused him to lose sales and (b) the testimony from a purported economics expert precisely to the same effect. Even if this "evidence" could establish a link between Respondents' infomercial and Petitioners' alleged losses, this would not constitute "actual evidence of some injury *resulting from the deception*," rather than from competition. *Harper House*, 889 F.2d at 210 (emphasis in original). (App. at 3-5.) *See also Can-Am Engineering Co. v. Henderson Glass, Inc.*, 814 F.2d 253, 258 (6th Cir. 1987) (proof of a decrease in plaintiff's sales contemporaneous with defendant's new advertising is insufficient to prove that lost sales were caused by defendant's alleged misrepresentations); *Toro Co. v. Textron, Inc.*, 499 F. Supp. 241, 253-54 (D. Del. 1980) ("Section 43(a) [of the Lanham Act] prohibits unfair competition rather than competition itself and [plaintiff] has failed to show that the experience of these parties in the marketplace was a product of the former, rather than the latter.").

Petitioners err when they argue that evidence of the link between deceived consumers and Petitioners' lost

sales goes to the weight, rather than to the fact, of harm. *See, e.g.*, Pet. at 14 (citing *Grant Airmass Corp. v. Gaymar Industries, Inc.*, 645 F. Supp. 1507 (S.D.N.Y. 1986)); and at 21-22 (citing *Summers v. Tice*, 33 Cal. 2d 80 (1948)). *Summers v. Tice* presents the classic tort law problem where the plaintiff was injured by one or the other or both of two defendants, but does not know the extent of harm each did. In that case, where the fact of injury is undisputed, tort law will require the defendants to apportion fault amongst themselves. In the present case, of course, the crucial issue is whether Respondents' alleged misrepresentations caused any harm, *at all*, to Petitioners.

Grant Airmass involved a claim by the plaintiff that the defendant's series of advertisements directly comparing the plaintiff's and the defendant's products were based on false scientific analysis. The District Court denied summary judgment to the defendant because the plaintiff presented "credible evidence of diversion of sales resulting from [the defendant's] allegedly false claims of product superiority." 645 F. Supp. at 1514. The plaintiff's evidence in that case included deposition testimony of a number of purchasers who read and relied on the allegedly false claims in the defendant's ads in making their purchasing decisions. Here, of course, Petitioners present no evidence of diversion and there is no reason to believe that a viewer of Respondents' non-comparative infomercial would have purchased *Petitioners'* product *but for* Respondents' alleged misrepresentations regarding *Respondents'* product.[4]

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[4] It is hardly surprising that Petitioners are unable to provide any proof of causation. Damage actions for false

Having reviewed *de novo* the evidence in this case,[5] the Ninth Circuit correctly found that "[t]he causal link is missing." (App. at 5.)

B. There Is No Conflict Between The Circuits Regarding The Determination Of The Relevant Market Under The Lanham Act

Petitioners weakly contend that the Ninth Circuit's affirmance of summary judgment created a conflict with another Circuit[6] on whether or not a determination of the "relevant market" can be made by the trial court. (Pet. at 17-20.) No such conflict exists.

First, the Ninth Circuit's unpublished memorandum neither mentions nor assumes anything about relevant

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advertising (outside the context of false *comparative* advertising) regularly founder on the plaintiff's inability to show diverted sales resulting from the alleged misrepresentations. *See, e.g., Harper House*, 889 F.2d at 210-11; *Burndy Corp., supra*, 584 F. Supp. at 665; *Otis Clapp & Son, Inc. v. Filmore Vitamin Co.*, 754 F.2d 738, 746 (7th Cir. 1985).

[5] The Petition curiously states: "The Ninth Circuit's December 1, 1994 memorandum opinion does not indicate that the Court applied the appropriate *de novo* standard of review." (Pet. at 24.) Although the Memorandum Opinion does not use the words "*de novo*," the panel itself reviewed the evidence – including the declaration and analysis of Petitioners' purported expert, Dr. Thomas – before concluding that "[t]here is not evidence sufficient to create a genuine issue of material fact. . . . " (App. at 4.)

[6] Petitioners claim the conflict is between the Ninth and *Seventh* Circuits (Pet. at 19-20), but their sole authority on this point is a *Third* Circuit case, *Country Floors, Inc. v. Gepner*, 930 F.2d 1056 (3d Cir. 1991).

markets. All it says is that Petitioners failed to show a causal connection between their alleged lost sales and Respondents' alleged deception; this proposition holds true regardless of the size or definition of the relevant market. As the District Court noted below, even if only Petitioners and Respondents chose to market golf instructional videotapes through the infomercial technique, there remained "multiple differences" in the parties' marketing methods, including "price, quantity, possibly quality." These differences preclude the theory that any sales of Respondents' product necessarily caused a decrease in the sales of Petitioners' product. (App. at 19-20.)

Second, the Third Circuit case Petitioners cite, *Country Floors, Inc. v. Gepner*, 930 F.2d 1056 (3d Cir. 1991), does not in any event address the same issue that was raised by Petitioners in the District Court below. *Country Floors* involved a Lanham Act suit for injunctive relief over similar trademarks used by the plaintiff and the defendant in connection with tile flooring. After reversing a grant of summary judgment to the defendant based on the likelihood of confusion issue, the Third Circuit noted, in *dicta*, that there was also an evidentiary dispute over whether the plaintiff's and the defendant's customers were sophisticated members of the trade and therefore less likely to be confused as between similar trademarks. 930 F.2d at 1066. Thus, the issue in *Country Floors* was the determination of the "relevant customer market," not the definition of the "relevant sales channel," as in the present case.

Third, the District Court below did nothing inconsistent with *Country Floors*. To the contrary, in determining

that Petitioners and Respondents did not compete exclusively in any specialized "infomercial sub-market," the District Court relied on Petitioners' own concessions that: (1) there are hundreds of golf instructional videotapes on the market;[7] and (2) products advertised or sold through different marketing channels compete with one another. (App. at 15-20.) Accordingly, unlike in *Country Floors*, there was no genuine issue of material fact because Petitioners completely undermined their own argument that the relevant market consisted of only two companies.

Consequently, there is no actual or genuine conflict between the Circuit Courts of Appeal that would support the grant of this Petition.

C. This Case Presents No Special Or Important Reason To Address The Purposes Or Application Of The Lanham Act

Petitioners argue that this case is "of exceptional importance" supposedly because it "frustrates the purposes of the Lanham Act" to preserve free and fair competition. (Pet. at 25.) But it is Petitioners who have sought to stifle competition by seeking judicial intervention to remove a competitor. Fortunately, to prevent the Lanham Act's misuse for anticompetitive purposes, courts have required that one who invokes the statute meet the burden of proving he has been injured from the alleged false advertising.

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[7] This concession distinguishes *Electronics Corp. of America v. Honeywell, Inc.*, 428 F.2d 191 (1st Cir. 1970), cited in the Petition at 15. In *Electronics Corp.*, the defendant made replacement parts for the plaintiff's electrical control units, the only other supplier of which parts was the plaintiff.

In this case, Petitioners were given ample opportunity to present evidence – if they could – of harm resulting from Respondents' allegedly false advertisement. There is no evidence consumers were harmed; nor could Petitioners cite to a single sale that was diverted from them to Respondents due to any alleged misrepresentations. Accordingly, in two narrowly-drawn, well-reasoned and unpublished opinions, the District Court and the Ninth Circuit concluded that Petitioners had not met their burden of raising a triable issue of fact on the crucial element of causation of harm.

By properly applying the Lanham Act's requirements, the statute's pro-competitive purposes were well served. In these circumstances, this case presents no special or important issue to be resolved by this Court.

IV. CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

DATED: June 7, 1995

Respectfully submitted,

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